IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.959 OF 2004

The Indian Airlines Ltd. ...Petitioners

v/s

Shri A.G. Vispute and anr. ...Respondents

Mr R.S. Pai with Mr Londhe i/b M/s Sanjay Udeshi and Co. for Petitioners.

None for Respondents.

CORAM : D.K. DESHMUKH J.

DATE : 24TH JULY 2006.

P.C. :-

1. The facts that are material and relevant for deciding this petition are that the petitioners are a Company incorporated under the Companies Act 1956. The respondent No.1 was in the employment of the petitioner Company. A charge-sheet was issued against the respondent No.1. The charge was that the respondent No.1 committed theft of jewellery from the passenger of the petitioner airline. A departmental enquiry was held. In the departmental enquiry, the charge was held to be proved and punishment of removal from service was imposed. The petitioner filed an approval application before the National Industrial Tribunal. The National Industrial Tribunal made an order dated 26th February 2003 holding that the report and finding of the Enquiry Officer is perverse. The petitioners filed petition No.1251 of 2003 before this Court. This Court admitted that petition for final hearing and granted ad-interim order in terms of prayer clause (c). The ad-interim order was modified by this Court by order dated 10th November 2003 and by the modified order the Tribunal was permitted to proceed with the recording of evidence, but it was not to make any final order. It appears that thereafter the respondent No.1 made an application

before the Tribunal for grant of subsistence allowance. That application was opposed by the petitioners, however, the Tribunal granted that application by its order dated 5th February 2004 and directed the petitioners to pay subsistence allowance to the respondent No.1. It is this order which is challenged in this petition.

2. The respondent No.1 has been served, he is absent. I have heard learned counsel appearing for petitioner at length. The Tribunal by its order dated 26th February 2003 declined to grant approval to the action of removal taken by the petitioners. That order was challenged in writ petition No.1251 of 2003. While admitting that petition, this Court granted ad-interim order in terms of prayer clause (c). Prayer clause (c) of the petition reads as under :-

> "(c) stay the implementation of the impugned order dated 26/2/2003 pending the hearing and final disposal of the petition;"

. The consequences of grant of ad-interim order in terms of prayer clause (c) was that the operation of the order dated 26th February 2003 passed by the Tribunal declining to approve the order of removal

issued by the petitioners was stayed. The net result was that the order of removal of the respondent No.1 continued to be in force. The ad-interim order was modified by this Court by its order dated 10th November 2003. The modified order reads as under :-

> "The Tribunal will proceed with the proof of recording of evidence and will complete the recording of evidence. However, it will not pass the final order without further order of this Court."

. Reading of these two orders viz. the one passed by the Court earlier on 9th June 2003 granting ad-interim order in terms of prayer clause (c) and the order dated 10th November 2003 shows that though this Court stayed the order by which the Tribunal declined to approve the removal order, the Tribunal was directed to record evidence, but it was not to pass final order. The application for subsistence allowance was filed by the respondent No.1 under section 33(2)(b) of the Industrial Disputes Act 1947 as interpreted by a judgment of the Division Bench of this Court in the case if Air India Ltd. v/s Libio Francisco Colaco and anr., reported in 2004 1 CLR 767. It is paragraph 19 of that judgment which is relevant, which reads as under :-

"19. We have given our anxious thought to the submissions made at the Bar. In our opinion, the issue as to whether the Industrial Tribunal or Labour Court possesses power to grant interim order in proceedings under section 33(b)(ii) is not more res integra in view of the decision of the Supreme Court in Hotel Imperial v/s Hotel Workers Union (supra). In Hotel Imperial v/s Hotel Workers Union, the power of the Labour Court / Tribunal to grant interim relief was clearly recognised. In that case, the Supreme Court observed at 551 of 1959 II LLJ 544 that 'this, however, does not conclude the matter so far as the grant of interim relief in these cases is concerned. Even though there may be an implied term giving power to the employer to suspend a workman in the circumstances mentioned above, it would not affect the power of the Tribunal to grant interim relief, for such a power of suspension in the employer would not, on the principles already referred to above, take away the power of the Tribunal to grant interim relief if such power exist under the Act. The existence of such an implied term cannot bar the Tribunal from granting interim relief if it has the power to

do so under the Act.' We hasten to add that in that case the Court held that the employer was not liable to pay any wages from the date on which the employer decided to dismiss the workman and kept him under suspension pending seeking approval under section 33(a) of the Act. However, this position has been altered in the light of the decisions in Fakirabhai's case and Ram Lakhan's case. Moreover, it is not disputed before us that the effect of not granting approval would inescapably revert the position of the workman vis-a-vis management to that of a servant and master and in such a case it will have to be construed that the power conferred on the Industrial Tribunal or Labour Court under section 33(2)(b) will include power to grant interim relief in appropriate cases. In Jaipur Zila Bank's case, the Constitution Bench clearly held that the effect of refusal to grant approval has the effect of making an order of dismissal void ab initio and the worker would be deemed to be reinstated in service. Therefore, if the effect of the order of the Tribunal is to overturn the order of dismissal, then the Tribunal would have jurisdiction to grant interim relief in appropriate cases, though

section does not expressly confer any power to make an interim order directing payment of full or part of the wages to a dismissed workman."

. Perusal of the above quoted paragraph shows that according to this Court, the Tribunal gets jurisdiction to make an order against the employer for payment of subsistence allowance because as a result of the Tribunal declining to approve the order imposing punishment, the workman gets reinstated in service but because the enquiry is pending against him, he is deemed to be under suspension which entitles him to subsistence allowance. Therefore, for being entitled to make an application for subsistence allowance under section 33(2)(b), it is necessary that the order imposing punishment of the workman should be in force. In the present case, though as a result of the order of the Tribunal declining to approve the removal order, the removal order ceased to be in operation but because this Court granted interim relief staying operation of the order of the Tribunal declining to approve removal order, the removal order reemerged and continued to be in force. Therefore, the basic requirement of the punishment order not being in force, was not in existence when the respondent No.1 made the application for subsistence allowance before the Tribunal. The net

result of the interim order passed by this Court in writ petition No.1251 of 2003 was that the operation of the order passed by the Tribunal dated 26th February 2003 was suspended but the Tribunal was permitted to record evidence but was not permitted to pass final order. In this peculiar facts and circumstances, in my opinion, in terms of the judgment of the Division Bench quoted above, the Tribunal had no jurisdiction to make an order for payment of subsistence allowance. Perusal of the order of the Tribunal shows that according to the Tribunal because it was permitted to proceed with the recording of evidence, it has jurisdiction to make the order for payment of subsistence allowance. In my opinion, this basic assumption is non-existent. It is further to be seen here that the Tribunal itself has held that the order for payment of subsistence allowance is to be made in cases where the employer appears to be delaying the recording of evidence and holding of enquiry. In the peculiar facts of this case, even assuming that the employer was delaying the recording of evidence, it was of no consequence because even if the Tribunal proceeded as per the direction of this Court to record evidence, still the Tribunal could not have made any final order because this Court had not permitted the Tribunal to make any final order, all that the Tribunal was directed to do was to record evidence. In my opinion, for this reason also, the Tribunal was wrong in

passing the impugned order. In the result therefore, the present petition succeeds and is allowed, rule is made absolute in ems of prayer clause (a). No order as to costs.

. Parties to act on the copy of this order duly authenticated by the Associate / Private Secretary as true copy.

. Certified copy expedited.